IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EILEEN COWELL, et al	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
PALMER TOWNSHIP, et al	:	NO. 99-3216

O'Neill, J. December , 1999

MEMORANDUM

Plaintiffs Eileen Cowell, Richard Cowell, Sylvester Pany and Eastgate Land & Development Corp. assert federal claims against Palmer Township and various township officials for alleged violations of plaintiffs' rights under the Fifth and Fourteenth Amendments.[1] More specifically, they allege that defendants wrongfully interfered with their attempts to develop a twenty-three (23) acre tract referred to as the Palmer Business Park by imposing two separate municipal liens upon the property in 1992 and 1993 respectively. Plaintiffs also assert a number of state law claims arising from these alleged acts.

This Court has original jurisdiction over plaintiffs' federal claims pursuant to 28 U.S.C. § 1331 and may exercise supplemental jurisdiction over plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a). Presently before it are defendants' motions to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and plaintiffs' responses thereto. For the

[1] The various township officials named as defendants are Palmer Township Solicitor Donald Himmelreich; Palmer Township Supervisors Robert Lammi, Jeffrey Young, Robert Elliot, Robert Wasser, and Robert Daws; Palmer Township Supervisor and Treasurer Virginia S. Rickert; Palmer Township Director of Planning Theodore Borek; and Hemstreet, Himmelreich & Nitchkey, counsel to Palmer Township.

reasons discussed below I will dismiss plaintiffs' federal claims (Counts I and II) for failure to state a claim for which relief may be granted. In the absence of any remaining federal issues, I decline to exercise supplemental jurisdiction over plaintiffs' remaining state law claims. Accordingly, those claims will be dismissed without prejudice for plaintiffs to pursue in state court, should they choose to do so.

I.

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. In considering a motion to dismiss, I must accept as true all well-pleaded factual allegations contained in the complaint and must draw all reasonable inferences in plaintiffs' favor. I may grant defendants' motion only if I conclude that plaintiffs would not be entitled to relief under any set of facts consistent with their allegations. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F. 3d 1250, 1261 (3d Cir. 1994).

Matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case may be considered without converting a Rule 12(b)(6) motion into a motion for summary judgment. See Oshiver v. Levin. Fishbein, Sedran & Berman, 38 F.3d 1380, 1385, n. 2 (3d Cir. 1994).

II.

In Count I of the complaint, plaintiffs allege that defendants violated the takings clause of the Fifth Amendment by imposing improper municipal liens upon their property. According to plaintiffs, these two liens diminished their property's value and frustrated their planned development

and sale of the tract.

The Fifth Amendment's takings clause does not proscribe the taking of private property; it proscribes the taking of such property without just compensation. U.S. Const. amend. V. Accordingly, if a state provides an adequate procedure for seeking just compensation, a property owner cannot claim a violation of the takings clause until he or she has made use of that procedure and been denied just compensation. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-95 (1985); Stern v. Halligan, 158 F.3d 729, 734 (3d Cir. 1998). Since plaintiffs have not alleged that they sought and were denied just compensation through available state procedures, their claim that defendants violated the Fifth Amendment is not yet ripe.[2]

Moreover, even if plaintiffs' claim were ripe for adjudication, defendants' alleged actions do not rise to the level of a taking. Absent physical invasion or occupation, government action will constitute a taking only if that action deprives a property owner of all economically viable uses of his or her property. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017-19 (1992); Stern, 158 F.3d 734 n.7. Plaintiffs, however, have not alleged such sweeping interference with their property rights; they claim that the municipal liens imposed by defendants prevented their proposed subdivision and sale of the tract. Even accepting that allegation as true, plaintiffs have been deprived of only that particular use of their property. Compensation is not required by the takings clause when an owner is merely prevented from making the most profitable use of the property. See Rogin v. Bensalem Township, 616 F.2d 680, 690 (3d Cir. 1980). See also Park Ave. Tower Assoc. v. City

[2] Pennsylvania does provide adequate procedures through which one may seek compensation for the taking of property by either formal declaration or non-appropriative action which substantially deprives an owner of the beneficial use of the property. See 26 Pa. C.S.A. §§ 1-201 and 1-502. See also Defeo v. Sill, 810 F. Supp. 648, 658 (E.D. Pa 1993).

of New York, 746 F.2d 135, 138-39 (2d Cir. 1984); Defeo v. Sill, 810 F. Supp. 648, 657 (E.D. Pa. 1993).

III.

Plaintiffs allege in Count II of their complaint that defendants violated their rights under the due process clause of the Fourteenth Amendment by imposing improper municipal liens upon their property. From these allegations it appears that plaintiffs are asserting both procedural and substantive due process violations. Defendants contend that these claims are barred by the statute of limitations.[3]

Civil rights claims brought under 42 U.S.C. § 1983 are governed by state statutes of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 276-79 (1985). Thus, the applicable limitations period for plaintiffs' due process claim is two years. See 42 Pa. C.S.A. § 5524; see also Sameric Corp. of Delaware v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998). Typically, a § 1983 claim accrues, and the statute of limitations begins to run, when the plaintiff knew or should have known of the injury which is the basis of the action. King v. Township of East Lampeter, 17 F. Supp.2d 394, 415 (E.D. Pa. 1998). Here, the two municipal liens which are the

[3] Defendants also argued that the applicable statute of limitations barred plaintiffs' takings claim in Count I. However, a takings action may be filed directly under the Constitution. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316 n. 9 (1987). Whether the personal injury statute of limitations applies to such actions has been considered but apparently not resolved by the Court of Appeals. See 287 Corporate Center Assoc. v. Township of Bridgewater, 101 F.3d 320, 324 (3d Cir. 1996). But see Bieneman v. City of Chicago, 864 F.2d 463, 469-70 (7th Cir. 1988) (applying personal injury statute of limitations to actions brought under 5th Amendment for purposes of consistency).

Since Count I will be dismissed on other grounds, however, I need not consider the statute of limitations argument with regards to that claim.

basis of plaintiffs' action were imposed in 1992 and 1993 respectively.

Though plaintiffs do not appear to allege any facts which would necessitate a tolling of the limitations period, plaintiffs argue in their response that their claim is not time-barred because defendants' actions constitute a continuing violation. According to plaintiffs, defendants' imposition of liens which they knew to be improper and their subsequent refusal to remove those liens constitutes a single, continuing violation.

"In most federal causes of action, when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period ...." Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am., 927 F.2d 1283, 1295 (3d Cir. 1991). The focus is on the defendant's affirmative acts. Id. at 1296. Here, the last affirmative act occurred in 1993, when defendants imposed the second of the two liens, or at the latest, when defendants refused to accept payment on one of the liens in 1994. To hold, as plaintiffs suggest, that defendants' continued affirmance of these liens was in some way a series of separate, affirmative acts would stretch the continuing violation theory past the breaking point. Under such a theory, no limitations period would ever apply to plaintiffs' claims. See e.g., NLRB v. Pennwoven, 194 F.2d 521, 525 (3d Cir. 1952) (rejecting the Board's contention that an employer's discriminatory failure to reinstate an employee constituted a continuing violation, since under that reasoning the employee's case would never be closed until it was finally litigated).

Moreover, a continuing violation theory will not overcome the relevant statute of limitations if prior events should have alerted a reasonable person to act. See Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1415 n. 6 (10th Cir. 1993) (explaining that continuous violation doctrine is premised on the equitable notion thatthe statute of limitations should not begin to run

until a reasonable person would be aware that his or her rights have been violated); Bell v. Chesapeake & Ohio Ry. Co., 929 F.2d 220, 223-25 (6th Cir. 1991). See also King v. Township of East Lampeter, 17 F. Supp.2d 394, 416 (E.D. Pa. 1998); Hicks v. Big Brothers / Big Sisters of Am., 944 F. Supp. 405, 408 (E.D. Pa. 1996). Here, plaintiffs' own allegations show that plaintiffs were duly aware of the municipal liens when they were imposed in 1992 and 1993 and that they regarded these liens as improper from the outset.

IV.

When a federal court has dismissed all claims over which it has original jurisdiction, it should ordinarily decline to exercise supplemental jurisdiction over state law claims. See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). See also 28 U.S.C. § 1367(c). Thus, since no federal issues remain, I will dismiss plaintiffs' state law claims without prejudice. Plaintiffs are free to pursue these claims in state court should they choose to do so. The attention of plaintiffs' counsel is directed to 42 Pa. C. S. A. § 5103(b).

An appropriate Order follows.

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ORDER

AND NOW, this day of December, 1999, upon consideration of defendants' motions to dismiss the amended complaint and plaintiffs' responses thereto, IT IS HEREBY ORDERED that defendants motions are GRANTED:

1.) Counts I and II of plaintiffs' amended complaint are DISMISSED;

2.) Plaintiffs' remaining state law claims are DISMISSED WITHOUT PREJUDICE.

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THOMAS N. O'NEILL, JR. J.